

ENVIRONMENTAL QUALITY COUNCIL

September 11 and 12, 2000

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Exhibits are on file at the Legislative Environmental Policy Office.

COUNCIL MEMBERS PRESENT

Sen. William Crismore, Chair
Rep. Kim Gillan, Vice Chair
Rep. Paul Clark
Sen. Mack Cole
Rep. Monica Lindeen
Sen. Bea McCarthy
Sen. Ken Mesaros
Rep. Doug Mood
Sen. Jon Tester

Sen. Spook Stang
Rep. Bill Tash
Rep. Cindy Younkin
Mr. Tom Ebzery
Ms. Julie Lapeyre
Ms. Julia Page
Mr. Jerry Sorensen
Mr. Howard Strause

COUNCIL MEMBERS EXCUSED

None

STAFF MEMBERS PRESENT

Mr. Todd Everts
Ms. Krista Lee
Mr. Larry Mitchell
Ms. Mary Vandembosch
Ms. Judy Keintz, Secretary

VISITORS' LIST

Attachment #1

COUNCIL ACTION

- Approved minutes from the following: EQC Meeting of July 28, 2000; Eminent Domain Subcommittee Meeting of July 26 and 27, 2000; MEPA Subcommittee Meeting of July 27, 2000, Land Use/Environmental Trends Meeting of July 27, 2000; and Water Policy Subcommittee Meeting of July 26, 2000.
- Adopted the following draft legislation: LC7032, LC7031, LC7035, LC7037, LC0000 (CECRA), LC8001 (grey bill), LC8005 (grey bill), LC0222, LC1001.
- Approved a request to the Legislative Audit Committee to perform an audit on the Pheasant Enhancement Program.

I CALL TO ORDER AND ROLL CALL

CHAIRMAN CRISMORE called the meeting to order at 9:00 a.m. Roll call was noted; all members were present. (**Attachment #2.**)

II ADOPTION OF MINUTES

The following sets of minutes were approved by Council members: EQC Meeting of July 28, 2000; Eminent Domain Subcommittee Meeting of July 26 and 27, 2000; MEPA Subcommittee Meeting of July 27, 2000, Land Use/Environmental Trends Meeting of July 27, 2000; and Water Policy Subcommittee Meeting of July 26, 2000.

III ADMINISTRATIVE MATTERS

MR. EVERTS introduced **Gretchen Rupp**, the Director of the Water Resources Center. **Ms. Rupp** has taken the position formerly held by Dorothy Bradley. **Ms. Rupp** stated that she is a biologist and engineer. She has been employed by the Montana State University for the past six years.

IV STATUTORILY REQUIRED STATE AGENCY ENFORCEMENT AND COMPLIANCE REPORT TO THE EQC

A. Department of Natural Resources and Conservation

Bud Clinch, Director of the DNRC, provided the Department's report to the Council regarding Environmental Enforcement and Compliance, **Exhibit 1**. The report included activities in three division within the department to include the Forestry Division, Water Resources, and the Board of Oil and Gas. The report on the Forestry Division included best management practices (BMP) audits and private landowner assistance as well as the Hazard Reduction Program and the Streamside Management Zones. The Water Resources Program included the Dam Safety Program, the Water Measurements Program, and the Water Rights Program. The Board of Oil and Gas report included activities relative to permitting, reporting by applicants and operators, and the ongoing operations of oil and gas across the state.

CHAIRMAN CRISMORE questioned whether the BMP audits were completed. **Director Clinch** explained that the audits were ongoing at the current time. **Chris Tootell, Service Forestry Bureau**, reported that the BMP scores have increased. The industrial landowners have supplanted the DNRC in having the top scores.

SEN. COLE requested further information regarding the issue of the amendments to the Crow Tribe Water Rights Compact which were added in the 1999 Special Session. **Director Clinch** stated that Susan Cottingham, Reserved Water Rights Compact Commission, could provide a report later in the meeting.

MR. STRAUSE noted that news reports have stated that many of the recent fires have been started by individuals and/or loggers. He asked about the policy in regard to compensation for damages to state forestry lands. **Director Clinch** explained that there have been various sources of the fires throughout this fire season. Historically fire starts have been approximately 50% natural causes and 50% man-made causes. Of the 4,640 fires this year, the greater proportion were caused by lightning. Several of the substantial fires this year were man-caused fires. For the fires that fall under the jurisdiction of the DNRC, there is a policy to pursue suppression costs. Depending on the responsible party, the suppression costs often far exceed the ability to cover the costs.

MR. STRAUSE questioned whether there were any requirements that someone who has a permit to operate on state forests would need to put up a bond. **Director Clinch** explained that on permitted activities there are requirements for liability with substantial limits. This is not necessarily a bond but a proof of liability coverage. Oftentimes the entities the department litigates are power companies and railroads because they are two common causes of wildfires. In a few instances where fires have been attributed to logging or forest operations, there is usually several million dollars of liability coverage.

Public Comment

Patrick Heffernan, Montana Logging Association, remarked that there has been very good cooperation between the Department and the Association. Part of the cooperation includes intensive training sessions.

B. Department of Environmental Quality

John Arrigo, Administrator of the DEQ Enforcement Division, provided the Department's report on Environmental Enforcement and Compliance for FY 1999 and FY 2000, **Exhibit 2**. He noted that the program specific enforcement information was included within each statute set out in the report. The Department's goal is to ensure that the regulated entities are in compliance. An enforcement action is taken if a violator is recalcitrant and does not follow the directives provided by the Department or if the violation is of significance that deserves a penalty. They have developed an Enforcement Response Manual, **Exhibit 3**. The Department has signed a consolidated enforcement agreement with the Environmental Protection Agency (EPA). The DEQ Enforcement Division complaint clearinghouse has eliminated approximately 20 program-specific complaint forms. They receive approximately 1,000 complaints each year. These complaints include water, waste, air, and miscellaneous items. He provided a graph showing the complaints managed from July 1996 through June 2000, **Exhibit 4**, and another graph showing the cases managed from July 1996 through June 2000, **Exhibit 5**. Since 1996, they have initiated approximately 460 enforcement cases.

In regard to air quality, there have been 52 enforcement actions with 34 of the actions containing penalties. The average penalty is approximately \$26,000. Many violators implement supplemental environmental projects in lieu of paying penalties. In the past four years, the Department has initiated 99

public water supply enforcement actions. The average penalty is less than \$3,000. For the past ten years the Underground Storage Tank (UST) Program has been focused on compliance assistance. In the last year the Department has initiated 28 UST enforcement actions with 23 actions containing penalties. Usually the order includes some form of injunctive relief requiring the removal of the tank system.

Certain environmental protection statutes provide that the appeal is to the Department. The Department will be introducing legislation changing the procedure so that in the future appeals would be made to the Board of Environmental Review. Since the Department initiates the enforcement action, the circumstance of appealing to the Director places the Department in an uncomfortable position.

MR. STRAUSE noted that the Open Cut Program includes 26 bond forfeitures. He questioned the adequacy of the bonds to reclaim the project. **Mr. Arrigo** stated that the bonds are constantly reviewed. Many of the forfeitures result when the site has not been reclaimed and the bond is released.

Public Comment

Anne Hedges, Montana Environmental Information Center, stated that in regard to water quality violations, in the majority of instances no penalty has been assessed for unauthorized discharges. She further noted that the information in regard to the Sanitation in Subdivisions Program states that the Department believes they do not have enforcement authority in the Program. **Mr. Arrigo** stated that in regard to water quality enforcement actions, there are many cases that do not have penalties. Many times an order is issued and the facility needs to obtain a permit. Also, many of the regulated entities are municipalities. The Department believes it is important to upgrade their systems to eliminate the discharge and bring the system into compliance. In regard to subdivision enforcement, there has been no formal enforcement of the Sanitation in Subdivisions Act. Most of the program funding comes from subdivision review fees. Until recently, there was an internal agency dispute over whether or not those fees could also be used to fund enforcement efforts. Most of the technical staff's time is spent reviewing submittals.

C. Department of Agriculture

Steve Baril, Field Services Bureau, provided the Department's report to the Council regarding Environmental Enforcement and Compliance, **Exhibit 6**. The Department administers the requirement that pesticides be registered and labeled, and that certain individuals be qualified or licensed in order to use pesticides. The Department has five field offices located across the state with each office having a full time employee. In Montana, approximately 10,000 individuals are licensed to use pesticides. There are approximately 1600 licensed government and commercial applicators and approximately 500 pesticide dealers. The Department performs approximately 700 routine inspections per year. They conduct approximately 30 to 50 investigations per year. Education and compliance assistance are a large part of their program. Approximately 25% of the violations are discovered through routine inspections. The other

75% are discovered through complaints from the public and agency referrals. He provided a handout in regard to pesticide enforcement action and civil penalties, **Exhibit 7**.

MR. STRAUSE remarked that organic farmers have raised a concern when neighbors use pesticides and consequently they then have a problem certifying that their products are organic. **Mr. Baril** stated that the basic complaint they receive involves drift or runoff onto organic fields. The Department takes samples and if this has occurred, it is a violation of the pesticide law. If negligence is involved, a fine is issued.

George Algard, Technical Services Bureau, stated that the Groundwater Monitoring Program was started in 1984. A series of monitoring wells have been established across the state. They have found several pesticides in the monitoring wells. The Fairfield Bench area is noted for malting barley. Anheuser-Busch, the purchaser, has stringent requirements on the chemicals used. In 1994, during a random sampling, a new pesticide was present. The chemical company was contacted and they maintained that the chemical would not leach into the ground water. The EPA did not require the company to perform ground water testing prior to registering the chemical for use. Since 1995, the Department has been working with the chemical company, the producers, conservation districts and environmental groups. This advisory committee is developing best available technologies which should mitigate future contamination of ground water on the Bench.

REP. CLARK questioned how responsibility was shared with the DEQ in regard to pesticides in surface water. **Mr. Algard** explained that both the DEQ and the Department of Agriculture (DOA) can monitor for pesticides in ground water. The DEQ depends on the DOA's activities in regard to pesticides.

SEN. TESTER questioned the number of monitoring wells. **Mr. Algard** reported that they currently have approximately 4,000 monitoring wells statewide. With the exception of the Fairfield Bench area, the pesticide detections in random samplings would be less than 2%.

MR. EVERTS requested that the Council members inform the staff as to whether or not the state agency enforcement and compliance reporting is a valuable exercise.

REP. TASH maintained that the reporting is satisfying the purpose and intent of the legislation.

MR. SORENSEN stated that the agencies are following the statute. He raised a concern that the reporting is still not providing much information in regard to the condition of the environment.

REP. CLARK questioned whether the DOA is content with the placement of the wells it monitors, how it is monitoring them, or whether there is a need for improvements. He hoped that the Department is asking the same questions.

Mr. Tootell, DNRC, suggested that in the future the reporting be on a program-by-program basis. The last item could conclude how the program was working and how the state of the environment was responding to the program.

V. CROW WATER RIGHTS COMPACT

Susan Cottingham, Reserved Water Rights Compact Commission, reported that during the Special Session in June of 1999 in regard to the Crow Water Compact, there were some items anticipated to be completed during the following year. The Compact required that a stream flow management plan be prepared for the Big Horn River. The plan was officially signed by all three parties on June 17, 2000. This plan sets out the interaction of the Tribe's water right with the instream flow needs for the fisheries on the Big Horn River. An escrow account has also been set into place. Fifteen million dollars was authorized to be spent on the Crow Tribe water and coal tax settlements. Each year \$1.5 million is to be placed into an escrow account. By the time of the finalization of the agreement the amount in the account should include \$15 million plus interest. The first \$3 million has been transferred into the account. Another \$3 million has been requested for the next biennium.

In May there were new tribal elections and the two slates of candidates that worked on the Compact were voted out of office. The new candidates are critical of the Compact. A resolution has been passed disapproving the Compact and stream flow plan in its present form. The resolution itself has a number of misunderstandings regarding the Compact. The Governor and Attorney General were very concerned about the resolution. Once the Compact passes the legislature, it will go to Congress for authorizations. This bill would also include some settlement of the Section Two issues, a landownership issue. The Compact provides that the Tribe have a secret referendum ballot on the entire package. The new chairman of the Tribe has met with the Governor, the Attorney General, and the Compact Commission on August 10th. The Tribe's representatives maintain that they need to become more organized internally before they can address the substantive issues of the Compact. The Tribe's representatives have met with the federal negotiating team to discuss water, coal severance tax, and Section Two issues.

SEN. MCCARTHY questioned whether all members of the former negotiating team had been fired by the Tribe. **Ms. Cottingham** explained that all members of the former negotiating team are no longer on the negotiating team. She added that a new negotiating team has not been appointed at this time.

SEN. MCCARTHY requested that a brief report be prepared for the EQC members and other legislators to provide an update of the current circumstances.

SEN. TESTER questioned the circumstances needed for the Compact to become null and void. **Ms. Cottingham** stated that any one of the three parties can officially withdraw from the Compact by

notifying the other parties. [This has not happened yet; the resolution is not official notification.] The Compact would then be terminated and the matter would proceed to court.

MR. EBZERY questioned what would happen to the escrow money if the Compact were to become null and void. **Ms. Cottingham** explained that if the Compact were terminated or if the provisions do not become operational, the funds in the escrow account would be reverted to the General Fund.

VI STATUTORILY REQUIRED REVIEW OF ENVIRONMENTAL CONDITIONS AND TRENDS - PERFORMANCE MEASURES FOR WATER, AIR, AND INVASIVE SPECIES

MR. MITCHELL provided a handout entitled, “Environmental Trends and Conditions” and reviewed the same, **Exhibit 8**.

REP. YOUNKIN questioned whether the departments had identified beneficial uses of the environment. **Tom Ellerhoff, DEQ**, explained that they have done so. They have a lot of specific information. The Council needs to define their interests so that the departments can focus their information to match the interests.

SEN. TESTER stated that at the Joint Subcommittee meeting in May, the discussion centered on water, air, and invasive species. **Mr. Ellerhoff** explained that the departments all gather information on specific items. The beneficial use would tie the information together. **Chris Smith, Montana Department of Fish, Wildlife, and Parks**, maintained that beneficial uses would provide a framework within which they could identify the number of watersheds or reaches that were providing for all of beneficial uses or less than all of the beneficial uses. In the case of land, were the appropriate tradeoffs being made with respect to open space that is being converted to human habitation.

REP. TASH suggested that the uses be prioritized.

MR. STRAUSE maintained that the environmental condition is a separate issue from what people think of the beneficial uses of our environment.

MR. SORENSEN remarked that the discussion regarding beneficial uses could go on forever. He suggested that action be taken instead of a lengthy debate on beneficial use.

CHAIRMAN CRISMORE requested that MR. SORENSEN and SEN. TESTER provide a recommendation on this issue to the EQC.

VII PHEASANT ENHANCEMENT PROGRAM REVIEW

Don Childress, Montana Fish, Wildlife and Parks (MFWP), reported that legislation sponsored by FORMER SEN. ED SMITH earmarked revenue from the resident upland bird license and the non-resident game bird license. This involved \$2.00 in fees from resident licenses and \$23 from the non-resident licenses. The range of the funds is from \$630,000 to \$718,000 on an annual basis. In the 51st Legislature the bill was amended to include the Upland Game Bird Habitat Enhancement Program. Funds remaining after payments for the release of pheasants was available for habitat enhancement in cooperation with landowners and various conservation groups. The amendment provided for all upland game birds. This legislation greatly expanded the program.

The Department adopted rules. Applicants were encouraged to submit a proposal to the Department. The emphasis of the program was to increase pheasant populations. The landowner who agreed to participate in the program also needed to provide reasonable public hunting opportunities. Up to 200 pheasants were available for release at each project site. The birds were banded to allow for evaluation of the program.

Most of the funds have been expended in the upland bird habitat enhancement project. There have been two audits of this program. The first audit was requested by the department and the second audit was performed by the Legislative Audit Division. They have responded to the audit concerns and arrived at time frames for addressing the issues.

FORMER SEN. ED SMITH remarked that he sponsored SB 331 in 1987 which provided for funding the Upland Game Enhancement Program. Council members have been provided with a copy of the law, **Exhibit 9**, the audit report, **Exhibit 10**, and the study performed by Natural Resources Options, Inc., **Exhibit 11**. The audit found that in many cases reports were not filed and there was very little accounting for expenditures. The total spent by the program amounts to \$5,482,577. The revenue collected for the program was \$8,559,122. He requested an accounting for the remaining amount of \$3,076,000.

He specifically referred to the Russell Ranch project. One contract was written in 1992 for \$100,853 and in 1995 another contract was written for \$252,526. These contracts were for range improvement. The count for birds taken during the time of the contracts amounted to 241 birds which would amount to \$1,425.25 per bid. According to the balance sheet provided by the Department, **Exhibit 12**, the pipeline claim amounted to \$21,585. This project also purchased 43 gates and 53 corral panels. Photographs of the ranch were provided, **Exhibit 13**. MR. SMITH found several used gates on the property.

He asked the MFWP for documents showing the landowner's written request to participate in the program, which is required by rule. The Department did not have such documents. He further asked for documentation upon completion of a project and no such documentation was provided. There also was no monitoring of the projects by the Department.

SEN. STANG stated that some of this information has been presented to the Legislative Audit Committee. He suggested that the Legislative Audit Committee provide a report to the EQC on this matter. He further remarked that there would definitely be a difference of opinion as to whether the funds should be spent on habitat or birds. The first legislative audit showed the importance of developing the habitat. If the funds for habitat enhancement are being spent inappropriately, the Legislative Audit Committee is the forum to address the issue.

MR. SMITH stated that the Legislative Auditor did perform an on-site audit a week ago. The results of that audit are not currently available but he is aware that there were some discrepancies. In regard to the necessity for habitat, he commented that there are over 3 million acres of Conservation Reserve Program (CRP) in the state. This legislation was introduced to blend with that program.

Michael Sandoval, United States Department of Agriculture, pointed out that the MFWP has been spending a large amount of habitat improvement funds on lands with federal CRP contracts when their Department has been implementing the same since 1998. This includes food plots and shelter belts. They have sites that have prime habitat and the MFWP has agreed to provide only 10 to 25 birds per site.

Mr. Childress stated that the issue of the missing \$3 million is simply a matter of incomplete information. Their records show that currently there is \$1.2 million in the account. These funds are appropriated. In regard to monitoring, the audit recommended that the Department spend more time monitoring the projects. The Department responded and by 2000 a monitoring scheme will be in place. Department personnel and contractors will be used to implement the monitoring across all types of upland game bird projects. An audit of the Charlie Russell project is ongoing. The Department's policy in regard to block management is that no landowner is excluded from participation in block management due to involvement in other programs. The block management payments address impacts as a result of hunter activities.

A number of changes have been made in regard to contracts. The contract forms include a pre-approval process. Any project over \$25,000 must be approved in Helena. The CRP is currently not a part of the program. He maintained that in regard to the low number of birds accounted for in the program, it is not a requirement for hunters to report the number of birds they have harvested.

SEN. MESAROS remarked that very serious questions have been raised about the program.

Kent Rice, Legislative Audit Division, explained that they have been compiling information as a result of requests from SEN. LINDA NELSON. They are not performing an audit at this time.

SEN. STANG remarked that if the questions are not fully answered, SEN. NELSON would request a full audit. Alternatively, at that time this Council could request a full audit of the program.

SEN. COLE questioned the sources of the funding. **Mr. Childress** explained that the funds are from earmarked revenue from the sale of upland bird licenses. This includes \$2.00 from resident and \$23.00 from non-resident licenses and in 1997 raised \$110,000 from resident licenses and \$610,000 from non-resident licenses. The number varies by the number of licenses purchased per year. The amount of funds spent to date for pheasant releases was approximately \$261,000. MR. SMITH added that the amount of funds expended for range improvement was approximately \$1.9 million.

CHAIRMAN CRISMORE added that in 1999 the Legislature limited the amount of funds to be spent on the releasing of birds to \$30,000 per year.

Additional handouts - letter from Pat Graham, Director of MFWP to Ed Smith dated June 8, 2000, **Exhibit 14** and letter to Pat Graham from Ed Smith, dated August 25, 2000, **Exhibit 15**.

VIII AGENCY 2001 LEGISLATIVE PROPOSALS

A. Department of Fish, Wildlife, and Parks

Pat Graham, Director of MFWP, provided a handout entitled, "Executive Summary: 2001 Legislation", **Exhibit 16**, and reviewed the eight proposals set out in the handout.

SEN. COLE remarked that under proposal 2, the Department is proposing to raise funding by 7% in regard to boat fees in lieu of taxes. He questioned where the funds were currently going. **Mr. Graham** explained that those funds are currently dispersed to the counties. Coast Guard funds are available but a match is necessary. The counties were offered the federal funding if the boat in lieu money was used for water safety enforcement. Only two counties have done so but the public demand for this type of enforcement continues to escalate.

SEN. STANG questioned whether the Department would take over the enforcement in areas of access to boat ramps so the counties would no longer need to expend funds in this area. **Mr. Graham** maintained that they would be able to expand their services. The four FTE proposed would create a dozen positions across the state on a seasonal basis.

SEN. STANG further questioned whether the Department had considered reallocating their budget so the 7% would not need to come from the county budgets. **Mr. Graham** stated that the current water safety program is funded by fishing license funds. The enforcement issues are being created by personal water craft use. The question is whether or not the fisherman should pay for resolving conflicts on lakes.

Anglers are not causing the problems involving personal water craft and water skiing. He added that the Department is open to further discussions on this proposal.

REP. TASH noted that the absence of enforcement is a concern on the Beaverhead and Big Hole Rivers. Locally there appears to be an absence of personnel or ability to enforce existing laws. He believed local governments may have concerns with this proposal. **Mr. Graham** remarked that there is a fair amount of outfitting in this area and this is a separate issue.

CHAIRMAN CRISMORE questioned whether the Department had considered limiting the out-of-state houndsmen who are causing problems in his area. Neighboring states do not allow the chase of lions. **Mr. Graham** remarked that they would give some thought to the issue.

B. Department of Natural Resources and Conservation

Don MacIntyre, DNRC, provided a handout explaining the Department's 2001 Legislative Proposals (21), **Exhibit 17**, and reviewed the same.

MR. EBZERY remarked that there was a bill introduced during the last session which involved a temporary closure of the Upper Clark Fork Basin. If this was successful, there would then be legislation for permanent closure of the same. He noted that this issue was not included in the Department's 2001 Legislative Proposals. **Mr. MacIntyre** explained that this matter addressed working with the water users and Avista in the federal permitting process relative to acquiring a FERC license. The Avista application was granted and the permit was issued. The Federal Energy Regulatory Commission (FERC) responded that they would not include a federal condition relative to state water rights. This matter is now being addressed by a consensus building process within the Basin. Any legislation would come through that group and not the Department.

REP. YOUNKIN questioned the problems which prompted the request for a interim legislative study on water permit applications and change of use authorizations to appropriate water for uses in regard to ponds for fish and wildlife, wetland, recreational and aesthetic uses. **Mr. MacIntyre** explained that the problem involves whether or not the applicants can meet the proof requirements. There is a question as to whether aesthetics should be a beneficial use in Montana. This involves a policy question.

C. Department of Environmental Quality

Mark Simonich, Director of DEQ, remarked that the Department had originally submitted 20 pieces of legislation to the Governor's Office. Their first priority is to amend the Metal Mine Reclamation Act bonding requirements. An audit has been performed and certain recommendations need legislative changes. The proposed legislation would also clarify that a non bankrupt forfeiture of the bond would preclude a parent company from obtaining a permit for a new mine in the state. The Department has

found that in many cases the surety company is willing to take alternative steps for providing the funds without a forfeiture proceeding.

The Department would also like to amend several statutes to include the Strip Mining Act, the Metal Mine Reclamation Act, the Open Cut Mining Act, CECRA, the Water Treatment Plant Operators Certification Act and the Sanitation in Subdivisions Act. The proposal is that appeals under these Acts would go through the Board of Environmental Review. Currently the appeal goes to the Director after the Department has made the decision.

A request for the Petroleum Tank Release Compensation Board involves clarification of a statute stating that in order to be eligible all facilities needed to be in compliance at the time of the release and continued thereafter. There can be a question as to the point in time of the release. The Attorney General has indicated that the legislative intent was for the fund to be more available to the parties. The proposed legislation would provide that in instances of non-compliance, if the operator had worked with the Department to satisfactorily correct the non-compliance issue, the eligibility requirement could be satisfied.

An amendment is proposed to the Sanitation in Subdivisions Act. Certain portions of subdivisions are reviewed at the county level while other portions of subdivisions are reviewed at the state level and oftentimes the reviews do not match. The Legislative Auditor has suggested that all subdivision review be handled at the county level and the state be responsible for establishing standards. The counties are uncomfortable with this recommendation.

An amendment is also proposed to the CECRA law. This would allow the Department to charge interest on delinquent payments billed under CECRA's cost recovery authority. The Department also would like to clarify the notice requirements under the Act as well as subsequent liability implications for cost recovery purposes. Currently the Department may not cost recover from any PRPs or against any individuals unless they have noticed them as PRPs.

The Department proposes establishing a clean-up account. This bill was passed by the legislature last session but the Department asked the Governor to veto the bill because the funds being diverted in the bill would have left a shortage in HB2. This is the Environmental Rehabilitation and Response Act. The Department has penalty authority under every environmental law it administers. Currently the penalties go to the General Fund. The Department would like the penalties to be placed into a state special revenue account earmarked for clean up purposes subject to direct appropriation by the Legislature.

They have revised a bill introduced last session which is the Uniform Enforcement Act. Enforcement procedures would be standardized under the proposal. Another enforcement bill would address authority for administrative penalties.

An amendment is proposed for the Major Facilities Siting Act. It may be necessary to have bonding authority in this area. The bonding would be similar to the recommendations proposed for the Metal Mine Reclamation Act.

The Department proposes to amend the Water Quality Act relative to temporary water quality standards. This may involve clean up on an old mine discharge.

Amendments are being proposed to the Water Treatment Plant Operators Act. There is a redundant exemption dealing with certification requirements for operators of non-public water supply and waste water systems.

The Department would like to seek an increase in the junk vehicle fees. This has not been approved by the Governor at this time. The junk vehicle recycling proceeds have dropped to 37% of their previous amount over the years. The annual fees have decreased from \$1.00 and \$4.00 to .50 cents and \$1.50. The Department is proposing that these fees be increased to \$1.00 and \$2.00.

MR. STRAUSE questioned whether the appeal to the Board of Environmental Review would include oral argument. **Mr. Simonich** explained that a hearings examiner is appointed. Depositions may be taken and testimony is presented.

D. Department of Transportation

Nick Rotering, Department of Transportation, stated that the Department is drafting legislation that would place a cap on the amount of attorneys fees that could be received in an eminent domain proceeding. The Constitution states that the landowner will be compensated to the full extent of the loss as to the taking and other necessary costs of litigation. The proposal would place a statutory cap on the fees the attorney could recover, not the landowner. A sliding fee scale may be used. Currently these funds are taken from the state's share of the Highway Trust. The federal government is reluctant to participate in the attorney fees award with any state, so the burden of paying for attorney fees in a condemnation action falls to the state.

MR. STRAUSE remarked that this bill will not affect lawyers, the client will still be charged. This bill will prevent the landowner from going to court even if they believe they have a valid claim.

REP. CLARK stated that the landowner would foot the bill for the fees not covered by the court settlement. **Mr. Rotering** remarked that the landowner would be paid the cost of the taking, damage to the remainder and necessary expenses. The landowner would be made whole and this is simply an attempt to cap the amount of attorneys fees.

REP. CLARK believed this legislation would discourage attorneys, who are experts in the field, from participating in these types of settlements. It would be to the benefit of the condemnor to prolong proceedings and make it onerous for an individual who has limited means to go to court.

SEN. COLE requested more information in regard to the use of fiber optics in federal rights-of-way. **Mr. Rotering** explained that he had not seen any proposed legislation as a result of the Department of Transportation's Utility Task Force. The Task Force was convened to assess the possibility of using federal rights-of-way for utility projects.

IX COAL BED METHANE UPDATE

A. Bureau of Land Management

Aden Seidlitz, BLM, stated that they had not met the deadline for analyzing 250 coal bed methane wells for exploration and introduction in the Decker area. They found that there would be significant impacts to the Crow and Northern Cheyenne Indian Reservations and to the adjacent coal mines due to ground water draw down and that there would be a significant impact to wildlife. Following this determination, the project proponent, Redstone Gas Partners, indicated that the data used in the preliminary EA was already outdated and that more accurate data could be provided. This should be provided within the next two weeks. Once the information is received, another analysis will be performed. If the information eliminates or mitigates the previously identified significant impacts, the BLM will release the EA in an unsigned finding of no significant impact for a 30-day public comment period. If the significant impacts cannot be mitigated, the BLM and the company will have four options which include: 1) drop the project; 2) modify the project to eliminate or mitigate the identified significant impacts; 3) initiate a project specific EIS; or 4) initiate a programmatic EIS for coal bed methane activities throughout southeastern Montana. Their office is favoring a programmatic EIS and would ask the DEQ to cooperate in the project.

The BLM has taken the lead in establishing a coal bed methane coordination group. Representation on this group includes special interests, the coal bed methane industry, the coal industry, Tongue River Water Users, landowners, county commissioners, state agencies, other federal agencies and representatives from the Crow and Northern Cheyenne governments. The first meeting was held on July 12th in Forsyth. The group identified 60 needs and concerns which have been grouped into the following categories: 1) air quality, 2) environmental justice/socioeconomics, 3) wildlife concerns, 4) soils issues, 5) vegetation, and 6) water. Another meeting is scheduled for October 18th in Miles City. Industry will

inform the group in regard to a reasonable/foreseeable development scenario for coal bed methane activities in Southeastern Montana.

REP. TASH questioned whether reintroduction of water after gas extraction was still being considered. **Mr. Seidlitz** explained that this was reviewed and has not been considered as a viable option at this time.

MR. EBZERY inquired whether the situation in Wyoming was being reviewed. **Mr. Seidlitz** noted that the coals are different in Montana than they are in Wyoming. The water quality is different. They are using the available data and coordinating efforts with Wyoming. The Buffalo Field Office in Wyoming has prepared numerous EISs in regard to the activity in Wyoming. They are working together with the Wyoming area in regard to cumulative impacts.

MS. PAGE questioned the time frame needed to conduct a programmatic EIS. **Mr. Seidlitz** believed it could take up to two years to complete the same.

MR. EBZERY questioned whether activity in Wyoming was having an impact in Montana. **Mr. Seidlitz** stated that air quality issues were noted when reviewing cumulative issues. This would be mainly from coal train activity.

B. Board of Oil and Gas

Tom Richmond, Montana Board of Oil and Gas, provided a letter sent to oil and gas operators explaining the activities in coal bed methane in the last few months, **Exhibit 18**. He reviewed the same. He further provided a draft of the Request for Proposals to Drill Exploratory Coalbed Methane Gas Wells, **Exhibit 19**. Proposals will be sought from coal bed methane operators on a statewide basis for drilling under the settlement agreement for the 200 wells that are allowed to be drilled during the period of time in which the programmatic EIS is being prepared. The purpose of the test wells is to provide scientific information to support the programmatic EIS.

SEN. COLE inquired as to other coal basin areas outside of the Powder River that may become involved with this process. **Mr. Richmond** noted the Carbon County area around Bear Creek. They do not have a lot of information on areas outside of the Powder River Basin. There may be some areas of the state in which coal bed methane may be produced without producing significant quantities of water. The Environmental Protection Agency has primary jurisdiction over the injection of any fluid into underground sources of drinking water.

MR. SORENSEN questioned the amount of water provided by the wells. He believed storage could be a difficult issue. **Mr. Richmond** believed the two wells which fell outside the Redstone area produced approximately 10 to 15 gallons of water per minute.

REP. TASH noted the limitation on commercial production. **Mr. Richmond** explained that the concern is that if there is commercial production from one of the test wells, this would require a pipeline and a compressor. This would be beyond the scope of the agreement in regard to test wells.

C. Department of Environmental Quality

Mark Simonich, Director of the DEQ, noted that the applications for discharge permits has resulted in the issuance of a permit for discharge into the Tongue River. The permit was modified to reduce the volume to be discharged in order to meet a higher dilution ratio. The Squirrel Creek discharge would not meet the standards and the Department issued a notice of intent to deny the permit. Redstone Gas then withdrew their application for a permit. The Governor has decided to appoint the DEQ as the lead state agency for some type of larger environmental review. A programmatic EIS may well be one of the areas pursued on behalf of the state. The DEQ will coordinate state activities but will not be the sole decision maker for an EIS. The difficulty with a programmatic EIS is that the current statute does not provide for funding. None of the state agencies has a ready source of funding to prepare a programmatic EIS. The Governor will support funding for the same. As a part of the budget that is sent to the legislature, a line item appropriation may be set out for the coal bed methane development EIS.

MR. SORENSEN questioned whether information was available in regard to the economic impact of coal bed methane development in the state. **Mr. Richmond** remarked that the price of natural gas is currently very high. The economics of coal bed methane have changed dramatically in the last three months. When Redstone started this project over two years ago the spot price for natural gas was approximately \$2.00 per thousand cubic feet. Today the spot price is around \$4.50. In Wyoming there are approximately 3,000 producing wells with each of those wells producing approximately 150,000 cubic feet of gas per day. The demand for natural gas has increased recently because no new coal-fired power plants have been permitted for approximately ten years. There is only one permit pending for a coal-fired power plant. The difference is being made up with gas-fired turbines which are small installations that could be built in a short amount of time.

MS. PAGE questioned whether the DEQ had ongoing monitoring in place in regard to water quality. **Director Simonich** remarked that ongoing monitoring is in place. The monitoring in place is what prompted the Department to decrease the discharge when issuing the Tongue River permit.

X STATUTORILY REQUIRED WATER INFORMATION SYSTEM UPDATE TO THE EQC

Velda Welch, Natural Resource Information System, provided a handout on the NRIS Water Information System, **Exhibit 20**, and provided a presentation on the same.

The meeting was recessed for the day at 5:30 p.m. and reconvened on Tuesday, September 12 at 8:00 a.m.

XI EQC APPROVAL OR DISAPPROVAL OF CECRA DRAFT LEGISLATION

MR. MITCHELL provided a memo and draft legislation LC0000, **Exhibit 21**. He explained that the draft legislation was prepared to try to resolve a problem regarding the notification of people who are potentially liable for clean up under Montana's CECRA law. Changes were made to the law in 1997 and unanticipated consequences of the amendments appear to require the agency to notify each and every potentially liable party before it can take action.

Steve Wade, Burlington Northern and Sante Fe Railway Company, stated that this bill would be more appropriately addressed as a Department bill. The department and interested parties need to discuss the draft legislation. The EQC did not study the bill to determine whether or not there really is a problem.

Dexter Busby, Montana Refining Company, also agreed that the draft legislation should be brought forward by the Department rather than the EQC. The draft legislation tends to unravel the issues debated in the 1997 Legislature. Under the joint and several liability issue, the Department can take action or require anyone or everyone to take action. There is a difference of opinion as to whether the Department needs to identify everyone during the process or before the process begins.

Sandy Weiss, Yellowstone Valley Citizens Council, presented her written testimony, **Exhibit 22**.

Sandy Olsen, DEQ, stated that the Department is available to work with the EQC and interested parties in hopes of reaching a workable and agreeable process.

REP. YOUNKIN questioned the time frame involved for the Department to draft legislation. **Ms. Olsen** stated that the Department had a placeholder for this bill.

SEN. MCCARTHY questioned whether the Lockwood group had been involved in preparation of the draft legislation. **Ms. Olsen** stated that they were provided the first draft at the EQC May meeting. There has not been direct feedback from the group. Discussions have been held with **Mr. Wade**.

MR. STRAUSE raised a concern that the Department may not follow through on sponsoring the bill. **Ms. Olsen** maintained that the Department committed at the May or July EQC meeting that they were willing to sponsor draft legislation. They are willing to work in partnership with the EQC or at the EQC's direction.

MS. PAGE questioned **Mr. Wade** regarding what part of the draft legislation he found confusing. She believed this to be a simple concept which removed the requirement that each and every potentially liable party be noticed before actions could begin. **Mr. Wade** responded that some of the changed language

would have an impact on the voluntary clean up plan. He believes that under the current language, the Department could act before notifying everyone.

Cindy Brooks, DEQ, stated that when reading all the sections of the statute as a whole, one of the requirements of the Department is that it conduct a good faith investigation to identify all potentially liable persons (PLPs) and issue notice letters to all the parties identified. The risk to the Department is the loss of ability, not only to cost-recover, but also to require any of the potentially liable persons to conduct remedial actions for failure to notify every PLP. The theory behind requiring that the Department notice all potentially liable persons was that if there was going to be a request for an allocation of liability, all potentially liable persons should be at the table.

Motion: SEN. COLE MOVED THAT THE EQC PROCEED WITH THE DRAFT LEGISLATION WITH THE UNDERSTANDING THAT ADDITIONAL CONCERNS WERE ADDRESSED.

SEN. MESAROS raised a concern that the EQC would not review modifications to the draft legislation. He suggested that the Department work on the draft legislation.

MR. EBZERY agreed that the changes may be substantial and the draft legislation should be brought forward by the Department.

SEN. COLE withdrew his motion.

Motion: SEN. TESTER MOVED THE APPROVAL OF LC0000.

REP. TASH remarked that the EQC would not have time to discuss any modifications. He believed that it should be a Department bill.

SEN. TESTER maintained that the Department played a critical role in designing the legislation.

Vote: THE MOTION CARRIED ON ROLL CALL VOTE OF 9-7 (Attachment #3).

XII EQC APPROVAL OR DISAPPROVAL OF THE EMINENT DOMAIN SUBCOMMITTEE LEGISLATION

MS. LEE reviewed the Eminent Domain Subcommittee Bill Summary, **Exhibit 23**.

Nick Rotering, MDOT, stated that the Department does not support LC7032 and would support LC7035 as drafted. The Department is opposed to LC7036 and LC7037. There is a concern that the value commissioners will address mitigation issues. One landowner at the end of the condemnation process may

be able to convince value commissioners or a judge into an action that would change the overall structure of the project.

Barb Ranf, Qwest, presented written testimony on behalf of the Montana Telecommunications Association, the Montana Independent Telecommunications Systems, AT&T, Touch America, and Qwest, **Exhibit 24**. The court could look to a recent 9th Circuit decision that states that some services offered by cable television are not cable service but are telecommunications services and therefore cable companies have access to eminent domain. Court rulings have held that video is not really a true telecommunication service but a cable service and therefore video shouldn't be allowed. Letting a court define the industry puts a lot of things up in the air. There are two definitions of telecommunications in Montana statute. One is the definition of regulated telecommunications. If this is used, the cooperatives are excluded from using eminent domain as well as data and video. The other definition in Montana statute is the one used for taxation of telecommunications under the telecommunications excise tax. This would exclude the internet. She asked the EQC to oppose LC7033.

Gail Abercrombie, Montana Petroleum Association, rose in opposition to LC7033. In regard to LC7036 and LC7037, she believed this legislation would create a series of commissioners who become mini engineers. Conflicts will result between federal regulations and the judge or commissioners. She suggested a change to LC7037 on page 3 (f) to include striking the words "measures to minimize" and insert the words "payment for". This would allow a claim for appropriate payment for damages. This change should also be made at the top of page 6 (b) and on page 8 (1).

Clint McRae, Rancher, spoke in support of legislation that would 1) give landowners the right to choose between an easement or fee title, 2) clarify that a condemnor cannot take land for a use that is not in the condemnation order, 3) limit landowner liability, and 4) address the issue of mitigation. They prefer LC7036, the bill that allows three condemnation commissioners to determine appropriate mitigation measures. They believe that damage mitigation is tied to the issue of just compensation. They strongly encourage passage of LC7033. The Subcommittee spent the last year studying the issue. The majority voted to recommend that this legislation be introduced. The bill is needed because landowners are concerned that easements may be so broadly worded that additional uses might be installed in a right-of-way without the consent of the landowner. New uses may bring additional damage and impacts to the landowner without additional compensation.

Mark Fix, Northern Plains Resources Council, Rancher, stated that in regard to LC7033, multiple uses can be specified and the landowner can be compensated for these uses. Under LC7035, the landowner should be given a choice. LC7036 would allow the commission which will be more fair in reviewing the mitigation of damages.

Don Allen, Western Environmental Trade Association, stated that they have no problem with LC7031. There are some concerns with LC7032 but they have decided not to oppose the bill. They do oppose LC7033 for the reasons outlined by **Ms. Ranf**. They do support LC7035 but question whether local governments, cities, and counties should also be given the exemption. They oppose LC7036 and LC7037. They would support the amendments presented by **Ms. Abercrombie**.

REP. MCGEE stated that the law is old. We currently have over a dozen telecommunications providers. Previously, we had one. There needs to be a delicate balance between the rights of the landowner and the right to build the infrastructures needed by the public. LC7031 will provide that a property owner is not liable for a condemnor's action. LC7032 clarifies the law so the average person can read the law. LC7033 adds language which states that the order must describe the property condemned and the purposes of such condemnation. The property may not be used for any purposes not specified in the condemnation order. LC7035 holds that in the public interest, the entity has the right, as the agent of the state, to take the land. He questioned whether the entity had the right to take fee title. He believed it did not unless one of two conditions was met. Either the landowner agrees to a fee simple taking or it can be proven by a preponderance of evidence before the court that this is worthy of a higher taking. Article II, Section 29 of the Constitution states that private property shall not be taken or damaged for public use without just compensation for the full extent of the loss. LC7036 and LC7037 simply present the fact that if the land is taken or damaged, the entity must pay.

REP. SHOCKLEY stated that in regard to LC7035, he believes that the only interest in land that can be taken through condemnation is an easement. The only argument presented to the Subcommittee for a fee simple taking was to make the bank loan sought by the condemnor to be easier or less expensive. In explanation of LC7031, he noted that in any litigation he has been involved in, the judge hears the evidence, makes his decision, and memorializes the action in an order. The industry wants an order written so broadly that it can be expanded upon after the litigants have gone home. The condemning entity has a great advantage in civil litigation. If they win, they receive the property as soon as the order is signed. Expanding on the order would simply be another advantage.

Motion/Vote: SEN. MESAROS MOVED THE ADOPTION OF LC7032. THE MOTION CARRIED UNANIMOUSLY.

Motion/Vote: SEN. MESAROS MOVED THE ADOPTION OF LC7031 (Exhibit 25). THE MOTION CARRIED UNANIMOUSLY.

Motion/Vote: SEN. STANG MOVED THE ADOPTION OF LC7035 (Exhibit 26). THE MOTION CARRIED UNANIMOUSLY.

LC7033 (Exhibit 27)

SEN. TESTER questioned the procedure used for a condemnation order for a pipeline where fiber optics would also be used. He further questioned whether discussions were held with the landowner. **Ms. Ranf** explained that the additional entity would need to negotiate with the landowner because the land owner would own the land and the pipeline would only have the easement.

REP. YOUNKIN inquired as to whether or not the fee simple condemnor would be limited by this legislation. **Mr. Petesch** stated that the fee simple condemnor would be limited by this legislation. When the power of eminent domain is exercised it needs to be for a public use. If a property is to be used by something other than a public use, even if fee simple title is taken, public use is considered abandoned and the property must be sold and offered to the person from whom it was taken or it reverts to the adjoining landowners. Section 70-30-111(3) provides for multiple public uses of property. In order for the utility to use a highway right-of-way, the utility company could bring a condemnation action to use that right-of-way. If the utility company could show that the use of the right-of-way is a more necessary public use, the order would allow those two uses to coexist.

MR. STRAUSE stated that the proponents have stated that the change in § 70-30-309 is not a substantive change. He questioned whether or not this was the case. **Mr. Petesch** agreed and added that subsection (2) states that the property described in the order shall vest in the plaintiff for the purposes therein specified. This limits the use to the public use articulated in the condemnation order filed with the clerk.

MR. SORENSEN raised a concern that this may impose another step and would restrict the future use of the property for the condemnee. **Mr. Petesch** remarked that this occurs in current language.

REP. YOUNKIN questioned the extent of specifics in a condemnation order. **Mr. Petesch** explained that the public use must be specified. The statutes governing pipelines specifically provide that when a pipeline is constructed, a telegraph line may be installed for guidance and control of the pipeline. The court has construed that authority to include fiber optic cable.

MR. EBZERY raised a concern that the judge may not adopt the condemnation order prepared by the condemnor.

Motion/Vote: SEN. COLE MOVED THAT LC7033 DO NOT PASS. The motion carried on roll call vote 9-7 (Attachment 4).

MS. PAGE stated that it is very important that there be only one single use for an enumerated public use. This is reiterating what is already in law. The concerns of the telecommunications industry are noted.

LC7036 and 7037 (Exhibits 28 and 29)

SEN. TESTER asked **Ms. Abercrombie** if she would support the legislation with the amendment. **Ms. Abercrombie** remarked that the amendment simplified the payment for damages so there would not be a lot of subjective mitigation measures. The damages are currently rolled into the payment for property. This may make it necessary to separate the payment for the easement from the payment for the damages.

SEN. COLE remarked that a statement had been made that the landowner did not have any input as to a fair and equitable settlement. He asked **Mr. Petesch** to clarify this matter. **Mr. Petesch** maintained that in the condemnation proceeding both sides are represented and have the opportunity to present evidence. This legislation would provide notice to the landowner that after rejecting the first offer from the condemnor, the landowner has the opportunity to submit a written statement requesting that certain damage reduction measures be taken as part of the implementation of the public use for which the condemnation is sought. Most landowners are not currently aware of this option.

Motion: MR. EBZERY MOVED THAT LC7036 DO NOT PASS.

MS. PAGE stated that LC7036 allows the commissioners to be the arbitrators. Landowners felt that the commissioners would be familiar with the conditions that existed and would therefore be more appropriate than the judge as the initial decision makers on what was appropriate.

Vote: The motion carried on roll call vote 10-6 (Attachment 5).

Motion: SEN. TESTER MOVED ADOPTION OF LC7037.

Substitute Motion: REP. YOUNKIN MOVED THE AMENDMENTS AS SET OUT BY MS. ABERCROMBIE. ON PAGE 3(f) THE WORDS “MEASURES TO MINIMIZE” BE DELETED AND “PAYMENT FOR” BE INSERTED. ON PAGE 6, LINE 3, THE SAME CHANGES WOULD BE MADE. ON PAGE 8, LINE 3, THE SAME CHANGES WOULD BE MADE.

Vote: The substitute motion carried with MS. PAGE voting “no”.

SEN. TESTER accepted the amendment to his motion.

Vote: The motion to adopt LC7037 as amended carried with MR. EBZERY, MR. SORENSEN, REP. MOOD and SEN. CRISMORE voting “no”.

XIII EQC APPROVAL OR DISAPPROVAL OF THE LAND USE/ENVIRONMENTAL TRENDS SUBCOMMITTEE LEGISLATION

MR. SORENSEN noted that the main focus of the Subcommittee was to locate a reasonable source of funding to help implement growth policies. He provided a handout containing a summary of Subcommittee recommendations for draft EQC bills funding for growth policies, **(Exhibit 30)**. LC8001, **(Exhibit 31)**, establishes a grant program to be administered by the Department of Commerce (DOC). The maximum grant is 50% of the eligible cost or \$50,000. The DOC may award up to 75% of the eligible costs if the local government demonstrates a severe hardship. The project must be completed within two years. This bill would be combined with any appropriation bill to make it work.

LC8005, **(Exhibit 32)**, is the first choice of the Subcommittee. An appropriation of \$1 million per year is recommended. This legislation would appropriate \$1 million per year from the General Fund to carry out the grant program. The DOC administrative costs would be a maximum of \$50,000 per year. The Subcommittee's second choice is LC8004, **(Exhibit 33)**. This would involve taking funds from the Treasure State Endowment Fund. This idea was presented by Dr. Peter Blouke, Director of the DOC, as an idea to help fund growth policies. This would include a statutory appropriation of \$375,000 each fiscal year to the grant program. It is recommended that this would terminate in June of 2005. The MACo and the League of Cities and Towns are open to this idea and recognize that planning is an important first step for infrastructure development. LC8003, **(Exhibit 34)**, is the Subcommittee's third choice for a funding mechanism. The proposal is to cut out a percentage of the coal severance tax revenue which would amount to 3.1% and would generate \$1 million each fiscal year.

Public Comment

Jane Jelinski, speaking for MACo and League of Cities and Towns, spoke in support of the funding draft legislation in the order of preference as set out by the Subcommittee.

Dave Cole, Department of Commerce, remarked that Dr. Blouke's letter to the Council puts forth the Department's position on the use and appropriateness of the Treasure State Endowment Program and how that might fit into growth management planning funds.

Anne Hedges, Montana Environmental Information Center, rose in strong support of LC8001. This is a very logical way to move forward with allocating funds to counties. Under a competitive grant program, people have to come forward with a good proposal in order to receive funds. The system is in place at the DOC to distribute these funds through a grant program. In regard to LC8004, she questioned whether \$375,000 per year would be sufficient. The Treasure State Endowment Fund (TSEF) is an appropriate place from which to be receiving these funds. This would have a better chance to get through the legislature than a General Fund appropriation.

Mike Foster, Montana Contractors Association, stated that they were in opposition to LC8004. This would have a significant impact on our economy because it would take money away from projects. Those projects are public works projects subject to the Little Davis Bacon Act which requires that the prevailing wage be paid to the workers on the projects. These jobs are some of the highest paying jobs in Montana. As an alternative, by requesting money from the General Fund in this growth era, funds would not be taken away from other programs, like TSEF, and certain aspects of our economy would not be adversely impacted. He strongly urged against the temptation to take funds from the TSEF which funds the infrastructure projects.

REP. TASH questioned how the TSEF proposal would affect the on-the-ground funds for the conservation districts. MR. SORENSEN explained this would have no effect on those funds.

MR. EBZERY questioned whether there was any room for adjustment on the infrastructure projects. **Mr. Foster** remarked that they oppose elimination of projects. They are always open to ideas. If it can be shown that it is in the best interest of the economy of the state and the families of the state to take a different approach, they are willing to discuss the matter. LC8004 appears to be a direct hit. These communities need to present their case to a legislative committee and work with the DNRC in attempting to convince them that their project is worthwhile. The number of projects funded is dependent upon the pool of available funds.

MR. SORENSEN stated that they requested \$375,000 instead of \$1 million for this reason. This was the amount proposed by the DOC. He maintained it was important to do more planning before more infrastructure projects were built. Fixing broken systems is important but a portion of these funds should go to well thought out planning. The small amount they are asking from the program would only affect one or two projects a year. He would not support increasing the amount from TSEF.

REP. TASH noted that it would be necessary to rearrange priorities due to the catastrophic fires. It is important to note the significance of long range planning.

REP. GILLAN asked about the amount of funding in the TSEF program. MS. VANDENBOSCH replied that the amount is increasing and it is projected to be \$12 million during the next biennium. **Newell Anderson, DOC**, stated that it grows approximately \$3 million per biennium.

REP. GILLAN stated that not having a growth plan in place prevents communities from economic development. This would be an appropriate temporary use of TSEF funds.

Motion: MR. SORENSEN MOVED THE ADOPTION OF LC8001.

REP. MOOD remarked that there are many counties that are not growing. MR. SORENSEN maintained that this legislation could help those counties in terms of economic development. He added that under the grant process, these counties may rate higher than other counties due to their special needs.

Vote: The motion carried unanimously.

Motion: MR. SORENSEN MOVED THE ADOPTION OF LC8005.

REP. YOUNKIN questioned whether smaller counties may need less funding. MR. SORENSEN remarked that smaller counties may need more funding because they do not have the staff that larger counties have. Also, there may not have been any work completed in regard to planning.

REP. CLARK acknowledged that the TSEF process involved choosing the most needy projects on a competitive basis. He questioned whether the General Fund process would involve the same process.

MR. SORENSEN stated that under all the proposed funding mechanisms the grants would be administered by the DOC. The DOC would develop rules to administer the grants.

Vote: The motion carried with MR. EBZERY voting “no”.

MR. SORENSEN requested that the Council take action on the other funding options. MS.

VANDENBOSCH clarified that the bills were drafted so that if the first choice bill passes and \$2 million is appropriated by the biennium, the other bills are void.

Motion: MR. SORENSEN MOVED THE ADOPTION OF LC8004, AS A SECOND CHOICE.

MR. MITCHELL noted the coordination instructions crafted into the bills. LC8003 states that the entire act is void if the grant program (LC8001) is not passed. If it is passed and either of the other funding mechanisms passes, the alternative funding option is void. The funding bills are all tied together in a sequence of options.

Vote: The motion carried on roll call vote 9-7 (Attachment 6).

Motion: MR. SORENSEN MOVED THE ADOPTION OF LC8003, AS A THIRD CHOICE.

SEN. COLE questioned whether the funds would be taken from the 8.36% allocation. MR. SORENSEN noted that this would be an additional 3% which would be taken from the overall coal severance fund.

SEN. COLE stated that this is a very complicated situation and he recommended that the Council not adopt the bill at this time.

SEN. MESAROS asked about the difference between LC8005 and LC8003. MS. VANDENBOSCH explained that under LC8003, the funds are allocated from coal severance tax revenue and the bill states that the money must be appropriated for grants for growth policies. The term is two bienniums with a termination date of June 30, 2005. LC8005 appropriates the money from the General Fund for this biennium only.

Vote: The motion failed on roll call vote 4-11 (Attachment 7).

SEN. TESTER clarified that his proxy vote on LC8004 was to be “no” if the first choice bill passed.

XIV EQC APPROVAL OR DISAPPROVAL OF THE MEPA SUBCOMMITTEE **LEGISLATION**

MR. EVERTS explained that there were two bills before the Council. The first is a study resolution. There were issues the Subcommittee was not able to address due to time constraints and there was an issue which the Subcommittee could not resolve. The second bill is a clean up bill which provides consistency within several internal sections. It provides that if there is a new issue brought before the judge, the judge remands that issue to the agency.

Don Allen, WETA, stated that they believe in the intent of the MEPA. Currently the MEPA process costs too much and takes too long. Even with the study resolution, legislation will be put forth to attempt to deal with some of the more critical issues.

Cary Hegreberg, Montana Wood Products Assn., provided photographs of the Sula State Forest taken several weeks ago, **Exhibit 35.** They do not believe that a further study of MEPA effectiveness or the implementation of definitions within MEPA would be productive. They do intend to use their recommendations provided to the MEPA Subcommittee as a basis to introduce legislation in the next session. They are hoping to have definitions in the MEPA.

The damage has been done in the Sula State Forest. This area is in terrible shape. There are huge significant impacts that have occurred as the result of catastrophic forest fires. The area needs rehabilitation and restoration at the present time. Regardless of what is done there will be huge sediment problems in those drainages. There has already been massive fish kills and huge impacts to wildlife and wildlife habitat. There will be huge impacts as a result of salvage logging and moving equipment into the areas. The largest impact will occur under the no action alternative. There are things that can be done to stabilize the slopes, reduce the amount of sediment moving into the streams, and reduce the chances of

roads and culverts blowing out. The DNRC is attempting to prepare an EA to do some work this winter. There will be opposition. The anti-forestry groups will try to use the MEPA as a procedural roadblock to action. The day after the fires, the timber was worth about 30% to 50% less than it was the day before the fires. This value approaches zero at about 18 months. An average EIS takes approximately 18 months to two years. Things need to get done before next spring. Due to the lack of definitions in the MEPA there will be wrangling over cumulative impacts and the definition of significance. It is important to do the right thing for the environment and reforest the area as quickly as possible.

Patrick Heffernan, Montana Logging Association, remarked that there is a lot of disagreement in regard to applying the MEPA procedurally. The DNRC has had challenges in recent years to their timber sale programs. The statute needs to address determining significant impacts so the managers are able to make the operational decisions necessary to move forward. There is a need for brackets around the edge of cumulative impacts.

Janet Ellis, Audubon Society, spoke in support of the resolution. Definitions were proposed late in the study. People did not have a chance to work on definitions. It would make sense for the EQC to carefully review the definitions in the next interim.

SEN. MCCARTHY remarked that the Subcommittee worked very diligently and held numerous public hearings. It was the consensus of the Subcommittee that the issues which were brought up in July have not had time for a public hearing. The fires are yet another issue. Four of the large fires are in her Senate District. The Department of State Lands has been contacted in regard to recovery of the timber. There will be cooperation for any legislation needed to expedite the process. At the next Board of Land Commissioners meeting there will be a request for the first timber sale. This will be for a million board feet. This can be done very quickly and expeditiously. She requested the Council's support in the resolution. Further study is necessary.

Mr. Hegreberg remarked that he does not believe people understand the scope of the problems which will be occurring in the Bitterroot this next spring. He predicts a catastrophic water quality dilemma of unprecedented proportions. There are things that can be done to minimize the damage.

MR. EVERTS explained that there is an exemption to the MEPA for the DNRC and state lands. This allows for certain emergency timber sale situations which include fire or blow down.

Mr. Hegreberg added that there was a limit of one million board feet on the statutory exemptions. SEN. MCCARTHY noted that this would be per sale.

REP. TASH remarked that in regard to categorical exclusions there is still a roadblock due to provisions in MEPA and NEPA. The current situation needs to be handled in a solution-oriented manner. Some of the harvested areas suffered the least impact. The fire burned around these areas.

SEN. MESAROS supported the resolution.

Motion/Vote: SEN. MCCARTHY MOVED THE ADOPTION OF LC0222 (Exhibit 36). THE MOTION CARRIED UNANIMOUSLY.

Motion/Vote: SEN. MCCARTHY MOVED THE ADOPTION OF LC1001 (Exhibit 37). THE MOTION CARRIED UNANIMOUSLY.

XV ASSIGNMENT OF EQC BILL SPONSORS FOR LEGISLATION THAT HAS NOT YET BEEN ASSIGNED

The following bill sponsors were assigned: LC7032, LC7031- SEN. COLE; LC7035 - REP. LINDEEN; LC7037, LC0000 (CECRA) - REP. GILLAN; LC8001, LC8004, LC8005 - REP. GILLAN; LC0222, LC1001 - SEN. MCCARTHY.

XVI PHEASANT ENHANCEMENT PROGRAM REVIEW CONT'D

John Northey, Legal Counsel for the Legislative Audit Division, reported that SEN. NELSON requested information regarding the Pheasant Enhancement Program. This was initiated by former SEN. ED SMITH who was concerned about the direction the program was taking. In 1989, the Legislature expanded the permissible use of the funds to include habitat improvement which is broad and relatively undefined in the law. MR. SMITH is concerned that there are not enough funds available for the raising and releasing of pheasants and too much funding is going into habitat enhancement. The MFWP contracted for a study of pheasant production population methods of enhancing pheasants in the state. The bottom line was that raising and releasing pheasants is not effective without adequate habitat. In 1999, the Legislature set the amount to be used for raising and releasing pheasants at \$30,000. This is a line item. Approximately \$500,000 per year is coming into this program. The records indicate that over the life of the program, through 1999, there has been \$7.8 million in revenues, \$7.3 million expended, and there is a \$500,000 fund balance. The numbers have not been audited and the claims have not been reviewed.

The Audit Division has completed the request from SEN. NELSON. The Legislature has set forth criteria in the law that the funds may be used for enhancement options. A limit has been placed on the funds to be spent for raising and releasing pheasants. Nothing came to their attention to indicate that any of the monies were used for purposes other than raising and releasing of pheasants or enhancing the habitat. They did not review the priorities on how the projects were funded. If the Audit Division were to do any further work in this regard, it may require hiring a consultant with some expertise in wildlife

management. Any requests for additional audit work would need to go through the Legislative Audit Committee. The situation appears to be a philosophical issue as to the approach of increasing the production of pheasants.

SEN. TESTER remarked that there appeared to be funds expended with little accomplishment. He questioned whether the Audit Division could determine if the money spent on habitat is actually beneficial. The funds expended have been quite significant. **Mr. Northey** stated they could pull a sample and determine what had been completed and the cost of the same. Whether or not the project completed relates to pheasant enhancement could also be reviewed. They do not have the expertise to determine certain details such as whether or not the type of shrubbery and grasses planted were appropriate. Judgement calls could be made on the cost of a particular project. It was his understanding that the funding was on a first come, first served basis. He does not believe there is a system to prioritize the projects. This could be reviewed.

SEN. MESAROS noted that with the three million acres of CRP in Montana, he has a difficult time understanding why the program is not very successful. His concern is the Department's accountability for expenditures of the program. A review process is very important. **Mr. Northey** remarked that the present program does not have a review process. An audit would review the controls over the system. If problems are found, the scope of the sample is expanded.

SEN. MCCARTHY questioned whether there was any way of determining if the number of birds and/or hunters has increased under this program. **Mr. Northey** believed this could be accomplished. The study commissioned by the MFWP related to the effectiveness of the raise and release program and concluded that it was not very effective. Ninety percent of the birds did not last through the winter. The conclusion was that the program should emphasize habitat improvement.

CHAIRMAN CRISMORE summarized that the question that needs to be addressed is whether or not the expenditures which MR. SMITH had presented to the Council were legitimate expenditures under this program. **Mr. Northey** explained that it would be necessary to review the expenditures on a project-by-project basis. The case which included cattle corrals and a bridge was a much broader project than most projects. It included opening a large ranch to public hunting. The statutory criteria for habitat enhancement is very broad. The Legislature could further define the criteria.

Motion: SEN. TESTER MOVED THAT THE EQC REQUEST THE LEGISLATIVE AUDIT COMMITTEE TO PERFORM AN AUDIT ON THE PHEASANT ENHANCEMENT PROGRAM.

SEN. MCCARTHY noted that the information should be available during the next legislative session.

Mr. Northey stated that the Legislative Audit Committee could prioritize this project. Preliminary data could be provided during the legislative session. Expenditures could be documented. The system for funding projects could be reviewed.

Vote: The motion carried unanimously.

MR. EVERTS stated that he would draft a letter on behalf of the EQC to the Chairman of the Legislative Audit Committee making the request.

Motion: MR. EBZERY MOVED THAT THE EQC RECONSIDER ITS ACTION ON LC8004.

MR. EBZERY remarked that he did not have the full facts on the implications of the TSEF. He also has a problem with using two funding sources in one bill. He believed this should go to the General Fund.

SEN. MCCARTHY raised a concern regarding the members who were no longer present at the meeting.

Vote: The motion carried on roll call vote 9-4 (Attachment 8).

Motion: MR. EBZERY MOVED THAT THE EQC NOT CONSIDER LC8004 (GREY BILL) AS A FUNDING SOURCE.

MR. EBZERY explained that he was under the belief that the \$375,000 was not encumbered. This amount has the potential of adversely impacting programs. He will support requesting the money from the General Fund.

Vote: The motion carried on roll call vote 8-5 (Attachment 9).

(Additional attachment - Proxy votes - **Attachment 10**)

XVII OTHER BUSINESS

A. *Environmental Trends*

SEN. TESTER remarked that the problem is that the agencies are not focusing on developing the criteria necessary to track environmental trends. He recommended that several members and a staff person work with the agencies to help them develop criteria to measure air, water, and invasive species before the next interim. The next EQC would then have a starting point by which to measure trends. Members who will work with this group include: REP. YOUNKIN, REP. CLARK, REP. TASH, and SEN. TESTER.

XVIII ADJOURNMENT

There being no further business, the meeting was adjourned.

SEN. CRISMORE, Chair